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No. 03-858

In the Supreme Court of the United States

UAW-LABOR EMPLOYMENT AND TRAINING CORPORATION, ET AL., PETITIONERS

v.

ELAINE L. CHAO, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Executive Order 13201 requires federal contractors to post a government notice that informs employees that they cannot be required to join a union or to pay union fees for purposes other than representational activities. The question presented is whether Executive Order 13201 is invalid under the doctrine of preemption articulated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), which bars state and local regulation of activities that are arguably protected under Section 7 of the National Labor Relations Act, 29 U.S.C. 157, or that are arguably prohibited under Section 8 of that Act, 29 U.S.C. 158.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 325 F.3d 360. The opinion of the district court (Pet. App. 16a-34a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 2003. A petition for rehearing was denied on September 11, 2003 (Pet. App. 35a). The petition for a writ of certiorari was filed on December 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 22, 2001, the President promulgated Executive Order 13201, 66 Fed. Reg. 11221, "in order to

ensure the economical and efficient administration and completion of Government contracts." Pet. App. 36a. The Executive Order provides that certain federal procurement contracts are to contain a provision requiring the contractor to post a government notice informing its employees of the rights recognized by this Court in *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963), and *Communications Workers of America* v. *Beck*, 487 U.S. 735 (1988). (These rights are commonly referred to as "*Beck* rights.") In particular, the notice is to inform employees (1) that they may not be required to join a union as a condition of employment, and (2) that, although they may be required to pay uniform periodic dues and initiation fees for collective bargaining, contract administration, and grievance adjustment, they may not be required to pay for other union activities. Pet. App. 37a.[1]

The President issued Executive Order 13021 pursuant to his authority under "the Constitution and the laws of the United States," expressly including the Federal Property and Administrative Services Act of 1949 (Procurement Act), 40 U.S.C. 471 *et seq.*; Act of Aug. 21, 2002, Pub. L. No. 107-217, 116 Stat. 1062 (to be codified at 40 U.S.C. 101 *et seq.*) (codification of Title 40, United States Code). See Pet. App. 36a. The Procurement Act authorizes the President to set "policies and directives that [he] considers necessary to carry out" the statutory purposes of ensuring "economical and efficient" government procurement and supply. 40

[1] Executive Order 13201 specifies the text of the notice that contractors are to post. See Pet. App. 37a-38a. Under implementing regulations proposed by the Department of Labor, the government will supply posters containing the mandated information, and contractors must display the official posters or exact duplicates. 66 Fed. Reg. 50,011 (2001).

U.S.C. 471, 486(a). In the Executive Order, the President explained that, "[w]hen workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced." Pet. App. 36a. The President added that "[t]he availability of such a workforce from which the United States may draw facilitates the efficient and economical completion of its procurement contracts." *Ibid.*

All contractors working under government procurement contracts of $100,000 or more are required to post the notice. Pet. App. 36a-37a; see 41 U.S.C. 403(11). Subcontractors and vendors working under the contract must also post the notice. Pet. App. 38a-39a. The Secretary of Labor may exempt certain contracts, classes of contracts, or facilities from the posting requirement. *Id.* at 39a-40a. The posting requirement applies only "to the extent consistent with law." *Id.* at 36a.

If a contractor fails to post the notice, its contract may be suspended or terminated. Pet. App. 41a. The contractor may also be barred from future contracts until it "has satisfied the Secretary that [it] has complied with and will carry out the provisions of th[e] order." *Ibid.*

2. Petitioners, three unions and a non-profit organization that provides job training and placement services, are parties to collective bargaining agreements that include union-security agreements that require employees to pay union dues as a condition of employment. Petitioners brought this action against the Secretary of Labor and the members of the Federal Acquisition Regulatory Council to challenge the validity of Executive Order 13201. They principally contended that the Executive Order is preempted by the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*,

under the doctrine articulated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). See Pet. App. 2a; C.A. App. 11, 13-15, 20-22.[2]

On cross-motions for summary judgment, the district court held that Executive Order 13201 is invalid under the *Garmon* preemption doctrine. The court recognized that the *Garmon* doctrine preempts state and local regulation of activities that arguably are protected by Section 7 of the NLRA, 29 U.S.C. 157, or that arguably are prohibited as unfair labor practices under Section 8 of the NLRA, 29 U.S.C. 158. Pet. App. 29a. The court also recognized that the conduct required of federal contractors by the Executive Order is neither protected under Section 7 nor prohibited under Section 8. *Id.* at 31a. The court nonetheless held that the *Garmon* doctrine applies. The court noted that the National Labor Relations Board (NLRB) has ruled that employers are permitted, but not required, under the NLRA to notify employees of their *Beck* rights. *Ibid.* (citing *Rochester Manufacturing Co.* v. *NLRB*, 323 N.L.R.B. 260 (1997), enforced, 194 F.3d 1311 (6th Cir. 1999) (Table), cert. denied, 529 U.S. 1066 (2000)). The court viewed the *Garmon* doctrine as preventing the President from imposing on federal contractors any requirement relating to labor relations that the NLRB has declined to impose on employers generally. *Ibid.*

3. The court of appeals reversed. Pet. App. 1a-15a.

The court of appeals held that Executive Order 13201 is valid under the *Garmon* doctrine because the Executive Order does not require conduct that is either

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[2] Petitioners also argued that the President lacked the authority under the Procurement Act to issue Executive Order 13201. See Pet. App. 2a. The court of appeals rejected that argument (*id.* at 9a-10a), and petitioners do not renew it here. See Pet. 6 n.3.

protected or prohibited by the NLRA. The court of appeals, like the district court, noted the NLRB's ruling in *Rochester Manufacturing* that employers are not required to post notices of employees' *Beck* rights. Unlike the district court, however, the court of appeals understood that *Rochester Manufacturing* excludes the conduct required by Executive Order 13201 from the scope of *Garmon* preemption. Pet. App. 4a. The court explained that the *Garmon* doctrine "operate[s] only as to activities arguably protected or prohibited, *not* to ones simply left alone, even if left alone deliberately." *Id.* at 4a-5a.

The court of appeals rejected the argument that *Garmon* preemption applies because the NLRB might someday change its position and require employers to notify employees of their *Beck* rights. Pet. App. 5a. The court adhered to this Court's instruction that it is the NLRB's "*actual decision* [that] controls" in determining whether conduct is arguably protected or arguably prohibited under the NLRA. *Ibid.* (quoting *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380, 397 (1986)).[3]

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[3] In addition, the court of appeals rejected the argument, which petitioners do not renew here, that Section 8(c) of the NLRA protects an employer's right not to post notices of *Beck* rights and that Executive Order 13201 does, therefore, regulate conduct that is protected by the NLRA. See 29 U.S.C. 158(c) ("The expressing of any views, arguments, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."). The court of appeals concluded that the expressive activities described in Section 8(c) "are not 'protected *by*' the NLRA, except from the NLRA itself." Pet. App. 6a. The court further concluded that, even if *Garmon* preemption were to apply to the activities described in Section

Judge Rogers, in dissent, maintained that Executive Order 13201 is invalid under the *Garmon* doctrine. Pet. App. 10a-15a. She reasoned that the Executive Order involves an area in which the NLRB "has primary jurisdiction" and imposes a "duty on employers that the NLRA, as interpreted by the Board, does not impose." *Id.* at 10a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, because this case involves a challenge to an Executive Order of the President, not to a state or local regulation, the case would not be a suitable vehicle in which to consider the general preemption questions that petitioners raise. This Court's review is therefore unwarranted.

1. The court of appeals correctly concluded that Executive Order 13201 is valid under the doctrine of NLRA preemption recognized in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), which "forbids state and local regulation of activities that are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8." *Building & Constr. Trades Council* v. *Associated Builders & Contractors*, 507 U.S. 218, 224 (1993) (quoting *Garmon*, 359 U.S. at 244). The *Garmon* doctrine thus serves to "protect[] the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or

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8(c), that provision does not afford employers an affirmative right of silence that prevents them from being required to post notices of *Beck* rights. *Id.* at 7a.

protected by the NLRA." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 748 (1985).[4]

Executive Order 13201 does not involve conduct that is arguably "protected by § 7," which governs the rights of employees. See 29 U.S.C. 157. When employers post a government notice that accurately informs employees of their rights under federal labor law, their employees remain free to organize, bargain collectively, and engage in other concerted activities, as well as to refrain from doing so.

Nor does Executive Order 13201 involve conduct that is arguably "prohibited by § 8," which bars employers and labor organizations from interfering with employees' exercise of Section 7 rights. See 29 U.S.C. 158. As the court of appeals recognized, and petitioners do not dispute (see Pet. 6), Section 8 neither requires employers to notify employees of their *Beck* rights nor prohibits employers from doing so. See Pet. App. 4a-5a, 7a. Accordingly, the court of appeals was correct that the Executive Order is not invalid under the *Garmon* doctrine, which "operat[es] only as to activities arguably

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[4] This Court recognized a separate NLRA preemption doctrine in *Lodge 76, International Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976), which prohibits "state and municipal regulation of areas that have been left 'to be controlled by the free play of economic forces.'" *Building & Constr. Trades Council*, 507 U.S. at 223 (quoting *Machinists*, 427 U.S. at 140). Under the *Machinists* doctrine, "the legislative purpose may * * * dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation." *Machinists*, 427 U.S. at 141 (quoting *Hanna Mining Co.* v. *Marine Eng'rs*, 382 U.S. 181, 187 (1965)). Petitioners have not argued for application of *Machinists* preemption in this case. Pet. App. 3a.

protected or prohibited, *not* to ones simply left alone, even if left alone deliberately." Pet. App. 5a.[5]

2. There is no merit to petitioners' contention that Executive Order 13201 creates preemptive "conflict" under *Garmon* by requiring federal contractors to engage in conduct that the NLRB assertedly could have regulated, but did not. See Pet. 8-9. *Garmon* itself recognizes that, when the NLRB has "decide[d] that an activity is neither protected nor prohibited" by the NLRA, state or local regulation of the activity is not preempted under the principles articulated in that case. 359 U.S. at 245; see *id.* at 246 (explaining that preemption does not apply when the NLRB has made a "clear determination" that the NLRA does not protect or prohibit an activity). The necessary implication is that the President, in the exercise of his authority under the Procurement Act, is not barred under the *Garmon* doctrine from addressing conduct that the NLRB itself has determined is neither required nor prohibited by the NLRA (even assuming that the

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[5] To the extent that petitioners rely (Pet. 18) on a quotation from the NLRB's brief in *Chamber of Commerce* v. *Lockyer*, No. 03-55166 (9th Cir. argued Sept. 12, 2003), petitioners' reliance is misplaced. *Lockyer* involves an NLRA preemption challenge to a state law prohibiting certain employers from using state funds to promote or deter union organizing by their employees. In its amicus brief in that case, the NLRB primarily relied on the *Machinists* doctrine (see note 4, *supra*) in support of its view that the state statute at issue is preempted. In the portion of that brief that addressed *Garmon* preemption, the NLRB expressly explained that there was no inconsistency between its position in *Lockyer* and the D.C. Circuit's application of *Garmon* in this case, because the D.C. Circuit found that the conduct required by Executive Order 13201 was neither arguably protected by Section 7 nor arguably prohibited by Section 8, whereas the state statute in *Lockyer* regulates conduct arguably prohibited by Section 8.

Garmon doctrine applies to actions of the President authorized by another Act of Congress).

Subsequent decisions of this Court reinforce that understanding. In *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380 (1986), which concerned whether the *Garmon* doctrine barred a tort suit in state court against a union, the Court explained that, if "there is an arguable case for pre-emption," a court "must defer to the [NLRB]." *Id.* at 397. If, on the other hand, an arguable case for preemption would exist but the NLRB has "decide[d] that the conduct is not protected or prohibited," then a court "may * * * entertain the litigation." *Ibid.* And, in *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), which concerned whether a trespass suit against a union was preempted under *Garmon*, the Court observed that a state court is not precluded from entertaining a challenge to such conduct, if "the state court can ascertain the actual legal significance of [the] conduct under federal law by reference to 'compelling precedent applied to essentially undisputed facts.'" *Id.* at 188-189 n.13 (quoting *Garmon*, 359 U.S. at 246).

Petitioners' sweeping theory of "field" preemption would expand the *Garmon* doctrine to all matters except those the NLRB has determined are entirely beyond the concern of the NLRA. Nothing in *Garmon* itself—or in any other decision of this Court concerning *Garmon* preemption—supports that result. Nor does petitioner's theory make any logical sense. The question whether the NLRA applies at all, like the question how the NLRA applies, is within the NLRB's primary authority.

3. Petitioners contend that the court of appeals' decision could "lead[] to a pattern of shifting" outcomes

if the NLRB were first to conclude that the NLRA permits, but does not require, particular conduct and were later to conclude that the conduct is required or prohibited. Pet. 9.[6] Such an outcome is not "senseless," as petitioners assert (*ibid.*), but is the natural result of a legal system that gives agencies broad latitude to interpret their own organic statutes, see, *e.g.*, *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-846 (1984); that permits agencies to modify their interpretations, see, *e.g.*, *NLRB* v. *Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 351 (1978); and that accords preemptive force to such interpretations, see, *e.g.*, *New York* v. *FERC*, 535 U.S. 1, 18-20 (2002). Under ordinary principles of conflict preemption, a federal regulation preempts a conflicting state rule, even if the regulation is newly adopted and the agency's prior position did not preempt the state rule. See, *e.g.*, *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 886 (2000); *City of New York* v. *FCC*, 486 U.S. 57, 66-70 (1988). The court of appeals' application of *Garmon* is thus consistent with settled principles of preemption by administrative action.[7]

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[6] The NLRB currently has before it two rulemaking petitions on whether employers should be required to post notices of *Beck* rights or more expansive notices advising employees of their federal rights and obligations under the NLRA. The pendency of those petitions, which will afford the NLRB the opportunity to reexamine the issues decided in *Rochester Manufacturing*, provides additional reason not to grant review in this case.

[7] Although petitioners suggest (Pet. 8-10, 12-14) that the court of appeals' interpretation of *Garmon* would authorize States generally to regulate matters that the NLRB has determined are permitted but not required under the NLRA, petitioners fail to acknowledge that *Garmon* is not the sole preemption doctrine under which such state regulation could be challenged. Under the doctrine of *Machinists* preemption, for instance, state regulation is

4. This case would be a peculiarly inappropriate vehicle to address the general scope of *Garmon* preemption because the case does not involve preemption at all. Executive Order 13201 was issued by the President of the United States pursuant to an express grant of authority in the Procurement Act to set policies for efficient and economical government contracting and supply. See 40 U.S.C. 471, 486(a). Petitioners do not challenge the court of appeals' holding that Executive Order 13201 constitutes a valid exercise of the President's authority under the Procurement Act. See note 2, *supra*. Thus although the NLRA vests administrative authority in the NLRB, the Procurement Act vests the President with the authority to establish policies—specifically including the one at issue here—concerning proprietary matters for the Executive Branch, and Article II of the Constitution vests the President with the authority to direct officers of the Executive Branch in performing their duties under the various laws that they are charged with administering. Those distinct grants of authority under federal law can and should be read harmoniously. See generally *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 534 (1995).

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preempted in certain circumstances in which *Garmon* preemption does not apply. See note 4, *supra*. Thus, contrary to petitioners' argument (Pet. 12-13), whether an employer recognizes a union based on the union's having collected authorization cards from a majority of the employees or, instead, insists that the union prove its majority status through an NLRB-conducted election is a choice that, because left unregulated by the NLRB for affirmative reasons of statutory policy under the NLRA (see *Linden Lumber Div.* v. *NLRB*, 419 U.S. 301 (1974)), may be insulated from conflicting state regulation on non-*Garmon* grounds. See *Machinists*, 427 U.S. at 141.

Because crucial distinctions exist between an Executive Order of the President governing federal procurement, on the one hand, and a state or local regulation, on the other, petitioners' assertions about the implications of the court of appeals' decision for cases involving state or local regulations are speculative. See Pet. 17-18. Nor do petitioners even suggest that any circuit conflict exists on the question presented here. The only decision of another circuit that involved a similar issue—*Contractors Ass'n* v. *Secretary of Labor*, 442 F.2d 159, 175 (3d Cir.), cert. denied, 404 U.S. 854 (1971)—is fully consistent with the decision in this case. There, the Third Circuit held that the *Garmon* doctrine did not require the invalidation of a federal requirement that certain contractors use affirmative action plans, even though the requirement had the effect of barring the use of "hiring hall arrangements" that are expressly permitted by the NLRA.[8] In view of the correctness of the decision in this case, as well as the absence of any circuit conflict, this case does not merit the Court's review.

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[8] Although petitioners cite (Pet. 13) an unreviewed district court decision that preliminarily enjoined a municipal airport rule based on an arguably more expansive view of the *Garmon* preemption doctrine, the defendants in that case "essentially conceded" that "the rule [was] preempted under the *Garmon* doctrine," and argued only that the rule came within a "market participant" exception to *Garmon* preemption. *Aeroground, Inc.* v. *City & County of San Francisco*, 170 F. Supp. 2d 950, 956 (N.D. Cal. 2001), appeal dismissed, No. 01-16602 (9th Cir. Dec. 28, 2001). Moreover, because *Aeroground* involved a municipal regulation, not an Executive Order of the President, the case is readily distinguishable from this one.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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